# Saying goodbye and PHI

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What should an employer do when an employee has been absent from work for a very long time and is receiving permanent health insurance ('PHI') benefits? Can the sick employee be dismissed or must he or she remain an employee? The issue is not clear cut – often the receipt of benefits under such insurance policies is reliant upon the employee remaining employed by the employer. Indeed, there have been cases in which employees have brought successful claims for damages against employers who dismiss them in such circumstances.

A recent case (Lloyd v BCQ Ltd) has revisited the issue and may have slightly improved the position of employers in such situations. This article explores the decision that was reached and what it means for employers considering dismissing those on long-term sick leave.

## Background

In 1996, the case of Aspden v Webbs Poultry & Meat Group (Holdings) Ltd considered the consequences of dismissing an employee who was entitled to PHI benefits before he had been able to take advantage of the PHI policy. Mr Aspden's contract of employment contained two crucial but contradictory provisions. On the one hand, the contract provided for the provision of PHI benefits whilst an incapacitated employee remained employed by the employer. On the other, the contract expressly permitted the employer to dismiss for prolonged incapacity.

The Court decided that it was necessary to resolve the conflict by implying a term into the employment contract to the effect that employment would not be terminated whilst the employee was incapacitated and could qualify for PHI benefits (unless he was guilty of gross misconduct justifying immediate dismissal). As a result, Mr Aspden recovered damages for breach of contract directly from his employer. A number of other cases followed in which employers were caught out by discrepancies between what they had offered by way of benefits on the one hand and what they thought they were entitled to do under the contract on the other. This led to employers becoming very careful about the way they drafted these sections of their contracts as the claims were for substantial sums amounting to multiple years of salary.

## The Lloyd Case

The recent case of Lloyd v BCQ resulted from the dismissal of Mr Lloyd by BCQ Limited whilst he was incapacitated and already receiving PHI benefits. Amongst other things, Mr Lloyd sought to establish (as in Aspden) that there was an implied term in his contract to the effect that he could not be dismissed whilst in receipt of such benefits.

However, unlike Mr Aspden's contract, Mr Lloyd's contract of employment did not contain an express provision entitling him to PHI benefits (it was an historic benefit from a period pre-dating his current contract of employment). The contract also included an express right to terminate employment in the case of incapacity and a provision stating that the contractual terms within the agreement contained the entire agreement between the parties and superseded all previous agreements.

Consequently, once it became apparent that Mr Lloyd would not be capable of returning to work in the foreseeable future, his employers dismissed him with notice pursuant to his contract. Mr Lloyd was also paid out a lump sum amount representing the full balance of monies due from the PHI provider.

The Employment Appeal Tribunal ('EAT') concluded that a term that the employer would not dismiss him whilst he was receiving PHI benefits should not be implied into Mr Lloyd's contract. The lack of reference to PHI cover in his contract was held to mean that he had no contractual right to continued cover. The EAT also thought that the existence of an express right to terminate in circumstances of incapacity meant that there was no contradiction as there had been in Mr Aspden's contract. Hence there was no need to imply any term and the employer could bring the contract to an end.

## Comment

This case is arguably helpful in establishing some limits to what employees can expect in such situation.

That said, it is a surprising decision in some ways. For example, the PHI benefit had been provided to employees for many years and it is arguable that there was therefore a contractual right to it. That argument might succeed in other cases on similar facts. The case certainly does not give an employer carte blanche to terminate an employment contract whenever it appears that there is a clause in the contract entitling it to do so. The

facts of this case were very specific and any employer proposing to end an employment relationship, where the consequence will be to deprive the employee of a valuable benefit, should take advice before doing so. Otherwise the employer may find itself having to fund the benefit from its own pocket.

The case is a reminder that some precautionary measures are sensible when offering potentially expensive benefits such as PHI insurance, such as:

- a clearly drafted express right in the contract to terminate employment when an employee is incapacitated for a significant period;
- a statement that this right may be invoked even if dismissal will prevent receipt of PHI benefits;
- a discussion with the PHI provider as to whether, once an employee is eligible for PHI benefits, they do not need to remain an employee to continue to receive them. This should then be reflected in the employee's contract;
- a provision in the contract to the effect that, if the insurer refuses to provide cover, then the employer is not obliged to provide cover itself, arrange alternative cover or take any action on the employee's behalf; and
- a provision limiting entitlement to benefits provided by the insurer and allowing for variation (for example if the insurer's terms change).

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